

No. 89-393

Supreme Court, U.S.

FILED

FEB 9 1990

JOSEPH E. SPANIOLO, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HARRY P. BEGIER, JR., TRUSTEE,

Petitioner

— v. —

UNITED STATES OF AMERICA
INTERNAL REVENUE SERVICE

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

JOINT APPENDIX

Kenneth W. Starr*
Solicitor General
Shirley D. Peterson
Assistant Attorney General
Gary D. Gary
Janet Kay Jones
Attorneys
Department of Justice
Washington, DC 20530
(202) 633-2217
Counsel for Respondent

Paul J. Winterhalter*
CIARDI, FISHBONE &
DIDONATO
1900 Spruce Street
Philadelphia, PA 19102
(215) 546-4370
Counsel for Petitioner

**Counsel of Record*

Petition for Writ of Certiorari Filed September 11, 1989
Certiorari Granted January 8, 1990

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APPENDIX A

<p style="text-align: center;"><i>Plaintiffs</i></p> <p>HARRY P. BEGIER JR. TRUSTEE FOR AMERICAN INTERNATIONAL AIRWAYS INC.</p>	<p style="text-align: center;"><i>Defendants</i></p> <p>UNITED STATES OF AMERICAN, INTERNAL REVENUE SERVICE</p>
<p><i>Attorneys</i></p>	
<p>PAUL WINTERHALTER 1900 Spruce St. Philadelphia, PA 19103</p>	<p>STUART J GLICK Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Ben Franklin Station Washington, DC 20044</p>

<i>Date</i>	<i>NR.</i>	<i>Proceedings</i>
Sept 18	1	COMPLAINT filed.
Sept 22 1987	2	SUMMONS and NOTICE OF TRIAL issued.
Feb 11	3	MOTION for Judgment on the Pleadings or in the Alternative, Summary Judgment filed 2/11/87 by Stuart Glick, Esq. jmr
Feb 11	4	Certification of Service of Motion for Judgment filed 2/11/87 by Stuart Glick, Esq. jmr
Feb 13	(3)	ORDER entered 2/11/87 requiring answer to Motion for Summary Judgment within 15 days of service.
	(3)	NOTICE OF HEARING re: Motion for Summary Judgment on 3/11/87. (1 notice)
Mar 4	5	RESPONSE OF THE UNITED STATES to the Plaintiff's Request for Production of Documents filed 3/4/87 by Edward Snyder, Esq. jmr
May 7		Hearing re: Complaint continued to 8/6/87. jmr

<u>Date</u>	<u>NR.</u>	<u>Proceedings</u>
May 19	6	PRE-TRIAL ORDER entered that having been reported that defendant agreed to withdraw its motion for judgment; it is ordered that hearing on the merits shall be continued until 8/6/87 at 10:00 a.m.; that all discovery be completed on or before 6/20/87. If any party contends that the other has failed to make discovery, the party seeking discovery shall file an appropriate motion to compel discovery on or before 6/26/87. If any motion to compel is filed, a hearing shall be held on 7/9/87. By 7/31/87 all parties are directed to file a list of all witnesses, copies of exhibits and a written stipulation of all undisputed facts. NO FURTHER CONTINUANCES OF THIS MATTER WILL BE FAVORED. pg. (2 notices)
May 22	(3)	MOTION to Withdraw Motion for Judgment on the Pleading and Certification of Service filed 5/21/87 by Stuart J. Glick, Esq.
May 22	(3)	ORDER entered 5/22/87 that the Motion is deemed withdrawn without prejudice. (2 notices).
Aug 7	7	STIPULATION of Facts filed 8/7/87 by Paul Winterhalter, Esq and Stuart Glick, Esq. jmr
Aug 25	8	MOTION for Summary Judgment, Memorandum in Support of Motion and Certification of Service filed 8/21/87 by Stuart Glick, Esq. jmr
	9	PRETRIAL STATEMENT, Exhibits and Certification of Service filed 8/21/87 by Stuart Glick, Esq. jmr
	10	Trustee's MEMORANDUM OF LAW and Certification of Service filed 8/21/87 by Paul Winterhalter, Esq.

<u>Date Filed</u>	<u>Date of Entry</u>	<u>Doc. Num.</u>	<u>Record</u>
1987			
	Sept 1	11	ORDER entered 9/1/87 that: 1) Parties shall prepare a supplemental Stipulation of Facts by 9/11/87, 2) Parties shall file Briefs in support of their positions, Plaintiff By 10/9/87, Defendant by 10/19/87, Plaintiff's Reply Brief by 10/23/87 and Defendant's Reply Brief by 10/28/87. (2 notices).
	Sept 1	12	MOTION to Amend Answer filed 9/1/87 by Stuart Glick, Esq.
	Oct 15	13	Declaration of Diane Wiktorski, Technician for the IRS filed.
	Oct 15	14	MOTION to Clarify or Grant Relief from Stipulation of Facts filed by Stuart Glick, Esq.
	Oct 16	(12)	ORDER entered 10/16/87 requiring Answer within 15 days of service.
		(12)	NOTICE OF HEARING re: Motion on 11/18/87. (1 notice). jmr
		(14)	ORDER entered requiring answer within 15 days of service.
		(14)	NOTICE OF HEARING re: Motion on 11/18/87. (1 notice).
	Oct 20		Hearing re; Motion for Relief held.
Oct 19	Oct 21	15	Trustee's RESPONSE to Defendant's Motion to Alter Admissions and Certification of Service filed by Paul Winterhalter, Esq.

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<u>Date Filed</u>	<u>Date of Entry</u>	<u>Doc. Num.</u>	<u>Record</u>
		16	ORDER entered 10/21/87 that the Motion to Clarify or Grant Relief is Granted in part and Defendant shall pay the sum of \$375. as reasonable counsel fees to the Trustee as a condition for the allowance of this Motion. (2 notices). jmr
		17	SECOND PRE-TRIAL ORDER entered that: 1) The matter is scheduled for 11/17/87, 2) The parties shall file by 11/10/87, a list of all witnesses, copies of all exhibits AND a supplemental written stipulation of all undisputed facts, 3) Parties shall file any Supplementary Memorandum of Law by 11/10/87 and NO FURTHER CONTINUANCES shall be allowed (2 notices). jmr
Nov 5	Nov 6	18	MOTION to Alter or Amend Order and MEMORANDUM OF LAW in Support of Motion to Alter or Amend Order and Certification of Service filed by Stuart Glick, Esq.
		(18)	NOTICE OF HEARING re: Motion on 12/2/87.
		(18)	ORDER entered requiring answer within 15 days of service. (1 notice). jmr
Nov 10	Nov 12	19	TRIAL BRIEF of USA and Certification of Service filed by Stuart Glick, Esq.

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<u>Date Filed</u>	<u>Date of Entry</u>	<u>Doc. Num.</u>	<u>Record</u>
		20	REVISED PRETRIAL STATEMENT, Exhibits and Certification of Service filed by Stuart Glick, Esq.
Nov 12	Nov 12	21	TRUSTEE'S PRETRIAL STATEMENT filed by Paul Winterhalter, Esq.
		22	ERRATUM SHEET filed by Stuart Glick, Counsel to USA. jmr
	Nov 17		Hearing re; Complaint — Held under Advisement. jmr
Nov 17	Nov 18	23	Plaintiff's RESPONSE to Defendant's MOTION to ALTER or AMEND Order and Certification of Service filed by Paul Winterhalter, Esq. jmr
Nov 18	Nov 19	24	ORDER entered that: 1) Transcript of the hearing of 11/17/87 shall be ordered by Plaintiff, 2) Parties shall file Briefs — Plaintiff within 20 days of report, Defendant within 20 days of receipt of Plaintiff's Brief. (2 notices). jmr
	Dec 2		
Dec 2	Dec 3	25	Hearing re; Motion of USA to alter and amend Order held — ORDER entered that the Defendant's Request to Alter is DENIED.
Dec 17	Dec 18	26	Trustee's MOTION to Open the Record filed by Paul Winterhalter, Esq.
		26	NOTICE OF HEARING to Consider Motion on 1/27/88

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<u>Date Filed</u>	<u>Date of Entry</u>	<u>Doc. Num.</u>	<u>Record</u>
		26	ORDER entered requiring answer within 15 days of service. (1 notice)
1988			
Dec 30	Jan 5	27	TRANSCRIPT OF HEARING held 11/17/87 filed.
Jan 12	Jan 13	28	Certification of Service of Motion to Open Record filed by Paul Winterhalter, Esq. jmr
Jan 11	Jan 19	29	OPPOSITION of the United States to Trustee's Motion to Open the Record, Exhibits and Certification of Service filed by Stuart Glick, Esq. jmr
	Jan 19	30	TRANSCRIPT of Hearing held 11/17/87 filed.
	Jan 27		Hearing re: Motion to Open Record — Settled — Stipulation to be filed. jmr
Feb 2	Feb 3	31	STIPULATION Filed by Paul Winterhalter, Esq. and Stuart Glick, Esq. admitting evidence without objection and Certification of Service. jmr
		32	Trustee's SUPPLEMENTAL MEMORANDUM OF LAW Exhibits and Certification of Service filed by Paul Winterhalter, Esq.
Feb 22	Feb 24	33	SUPPLEMENTAL MEMORANDUM OF LAW and Certification of Service filed by Stuart Glick, Esq.

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<u>Date Filed</u>	<u>Date of Entry</u>	<u>Doc. Num.</u>	<u>Record</u>
Mar 9	Mar 10	34	OPINION AND ORDER entered that judgment is entered in favor of Trustee and Plaintiff and against United States of America, IRS in the amount of \$700,410.33.pg
Mar 15	Mar 17	35	MOTION for Extension of Time to File Appeal from the Order of 3/9/88 filed by Stuart Glick, Esq.
Mar 18	Mar 21	36	ORDER entered approving extension of time to File Appeal to 4/8/88. (2 notices)
Mar 21	Mar 22	37	NOTICE OF APPEAL re: Order of 3/9/88 filed by Edward Snyder, Esq. jmr
	Mar 23	38	WITHDRAWAL of Notice of Appeal filed by Stuart Glick, Esq.
Apr 7	Apr 11	39	NOTICE OF APPEAL from the Order of 3/9/88 filed by Stuart Glick, Esq. jmr
Apr 22	Apr 25	40	United States' Designation of Record and Issues on Appeal filed by Stuart Glick, Esq.
		41	Certification of Service of Record and Issue filed by Stuart Glick, Esq.
	Apr 25	42	UNITED STATES' AMENDED DESIGNATION OF RECORD AND ISSUES ON APPEAL AND Certification of Service filed by Stuart Glick, Esq. jmr
	May 2		Appeal Sent to District Court.

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<u>Date Filed</u>	<u>Date of Entry</u>	<u>Doc. Num.</u>	<u>Record</u>
	May 2	43	Appellee's Designation of Additional Items to be Included in the Record on Appeal and Certification of Service filed by Paul Winterhalter, Esq.
Sept 16	Sept 19	44	Copy of ORDER ENTERED 8/15/88 from US District CA #88-3529, that the Order entered 9/9/88 from BKY Court is Affirmed and the Orders entered 10/21/87 & 11/3/87 from BKY Court are Reversed & Vacated, by the Hon. Donald W. Vanartsdalen.
Sept 16	Sept 19	45	Appeal Returned from US District Court
Oct 17	Oct 17	46	Memorandum from US District Court requesting the return of the record on appeal CA #88-3529
	Oct 17		Appeal & Supplement to appeal returned to US District Court, CA 88-3529
Oct 18	Oct 19	47	Acknowledgement from US District Court of appeal, CA 88-3529
1989 Jun 5		48	Case closing report prepared. ek

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<u>Plaintiffs</u>		<u>Defendants</u>
BEGIER, HARRY P., Trustee		UNITED STATES OF AMERICAN, INTERNAL REVENUE SERVICE
<u>Attorneys</u>		
Harry P. Beiger, Jr., Esq. Ten Penn Center Suite 1000 Philadelphia, PA 19103		Stuart J. Glick, Esq. Trial Attorney, Tax Division U.S. Department of Justice P.O. Box 227 Ben Franklin Station Washington, DC 20044
Paul J. Winterhalter, Esq. 1900 Spruce St. Philadelphia, PA 19103		
<u>Date</u>	<u>NR.</u>	<u>Proceedings</u>
1988		
Apr 1	29	Certificate of Appeal from Order of Bankruptcy Judge entered on 3/9/88, filed.
Apr 2	29	Briefing Schedule, filed.
May 3	10	Certificate of Appeal, Supplemental Index from Order of Bankruptcy Judge entered on 3/9/88, filed.
May 4	16	Govt's brief for the Appellant, filed.
Jun 5	6	Brief of Appellee, filed.
Jul 5	5	GOVT. MOTION FOR A CONTINUANCE, & CERT. OF SERVICE, FILED.
Jul 6	8	ORDER THAT THE HEARING SCHEDULED FOR 7/25/88 AT 9AM IS CONTINUED TO 8/15/88 AT 9:30 A.M., FILED.
		7/8/88 entered & copies mailed
Aug 7	15	Hearing re: sur appeal from the order of the bankruptcy judge on 3/9/88, Bench Opinion the decision of the bankruptcy judge in favor of the trustee is affirmed on the issue of avoidance. The decision of the bankruptcy judgment on the issue of attorney's fees is reversed, filed.

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<u>Date</u>	<u>NR.</u>	<u>Proceedings</u>
Aug 8	15	ORDER THAT THE DECISION AND ORDER OF U.S. BANKRUPTCY JUDGE DAVID A. SCHOLL ENTERED 3/9/88 IN ADVERSARY PROCEEDING 86-1076 IS AFFIRMED AND THAT THE ORDER OF THE BANKRUPTCY JUDGE ENTERED 10/21/87 IN SAID ADVERSARY PROCEEDING AWARDED COUNSEL \$375 IN COUNSEL FEES TO THE TRUSTEE IN BANKRUPTCY AND THE ORDER OF NOVEMBER 3, 1987, DENYING THE GOVERNMENT'S MOTION FOR RECONSIDERATION OF THE AWARD OF COUNSEL FEES, ARE REVERSED AND SAID ORDERS ARE VACATED, FILED. 8/16/88 entered & copies mailed
Sep	16	Original record (#1 & 3) returned to Bky. Ct.
—		
Sep X	20	Receipt re: original file, filed.
Oct	3	Transcript of Hearing of 8/15/88, filed.
10		
Oct	13	Govt's Notice of Appeal, filed. (USCA 88-1788) 10/17/88 copies to: H.P. Begier, Jr.; Esq.; P.J. Winterhafter, Esq., Clerk, USCA, Van- Artsdalen, J,
Oct	13	Copy of Clerk's Notice to Clerk, USCA, filed.
12		
Oct	17	Original record (Papers 1 & 3) returned from Bky. Court.
—		
Oct	26	Copy of Transcript Order, filed.
13		

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<u>Date</u>	<u>NR.</u>	<u>Proceedings</u>
Oct	27	RECORD COMPLETE FOR PURPOSES OF APPEAL-TRANSCRIPT ALREADY ON FILE.
—		
1990		
Jan 4	10	Copy of Order Supreme Court of the United States that the petition for a writ of certiorari to the U.S. Court of Appeals for the Third Circuit is granted and the parties are to adhere to the following briefing schedule etc., filed.

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Docket No. 88-1788

BEGIER, HARRY P., JR.,	:	APPELLANT/PETITIONER:
Trustee	:	Gary D. Gray, Esq.
	:	11/30/88
vs.	:	Gary R. Allen, Esq.
	:	10/31/88
UNITED STATES	:	Wynette J. Hewett, Esq.
OF AMERICA	:	12/5/88
INTERNAL REVENUE	:	Chief, Appellate Section
SERVICE,	:	U.S. Department of Justice
Appellant	:	Tax Division
	:	P.O. Box 502
	:	Washington, D.C. 20044
	:	202-633-3361/FTS-633-3361
	:	
	:	APPELLEE/RESPONDENT:
	:	Paul J. Winterhalter, Esq.
	:	10/27/88
	:	Ciardi, Fishbone & DiDonato
	:	1900 Spruce Street
	:	Phila., PA 19103
	:	215-546-4370
	:	[Appellee,
	:	Harry P. Begier, Jr.,
	:	Trustee]

Date	FILINGS - PROCEEDINGS
1989	
Jan. 31	At oral argmt. cnsl directed to submit memos re: separate accounts. Appellant to file within 7 days; appellee may respond seven days after. (ab)
Feb. 9	Mot. of aplt. for X of time to file gov't. response to aplee's supp. B from 2-14-89 to 2-21-89, filed. (gt)
Feb. 13	Order (Hutchinson, Scirica & Nygaard, C.J.) granting above motion, filed. (dr)
Jul 13	Oder Amending Opn. (Hutchinson, Scirica & Nygaard) fld. (bj)
Aug 3	Motion of Appellee For Stay of Mandate, w/serv. fld. (bj)
Aug 4	Order (Scirica, CJ) granting above Motion to & incl 9-3-89, fld. (bj)
Aug 31	Motion by Aplee for further Stay of Mandate, of additional 15 days to and including Sept. 18, 1989, w/serv. fld. (bj)
Sept. 5	Order (Scirica, C.J.) Further staying the issuance of the mandate to and incl. Sept. 18, 1989, filed. (ch)

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE:	:	CHAPTER 11
AMERICAN INTERNATIONAL	:	
AIRWAYS, INC.	:	BKY. NO. 84-02379K
	:	Debtor :
HARRY P. BEGIER, JR., Trustee	:	ADV. NO. 86-1076
	:	Plaintiff :
	:	
vs.	:	
UNITED STATES OF AMERICA :		
INTERNAL REVENUE SERVICE :		
	:	
	:	Defendant :

COMPLAINT

The Complaint of Harry P. Begier Jr., Esquire, Trustee, by his attorneys, Ciardi, Fishbone & DiDonato, respectfully represents:

1. This adversary proceeding is brought pursuant to Bankruptcy Rule 7001 and Section 547(b) of Title 11, United States Code.

2. On July 19, 1984, American International Airways, Inc. ("Debtor") filed a Petition under Chapter 11 of Title 11 of the United States Code. Debtor's principal place of business at all times pertinent hereto was 2655 Philmont Avenue, Huntingdon Valley, Pennsylvania 19006.

3. Plaintiff, Harry P. Begier, Jr., ("Plaintiff") is the duly appointed, qualified and acting Trustee in the above-captioned bankruptcy matter.

4. Defendant is the United States of America, Internal Revenue Service, (hereinafter "Defendant").

5. This Court has jurisdiction over this adversary proceeding based upon 28 U.S.C. Section 1334(b), in that it arises under Title 11 of United States Code. This is a "core proceeding" under 28 U.S.C. Section 157(b)(2)(F). Venue is proper in this Court.

COUNT I

6. Paragraphs 1 through 5 are incorporated herein as if fully set forth.

7. On or about May 1, 1984, which date is on or within the period 90 days preceding the filing of the Bankruptcy Petition as described in paragraph 2 hereof, the Debtor paid \$734,797.71 by check number OV5379 to the Defendant on account of an antecedent debt.

8. Said transfer was made while the Debtor was insolvent.

9. Said transfer will enable Defendant to recover more than it would receive as a creditor if (a) the bankruptcy case were a case under Chapter 7 of Title 11, United States Code; (b) the transfer had not been made; and (c) Defendant received payment of such debt to the extent provided by the Bankruptcy Code.

WHEREFORE, Plaintiff prays that the transfer by the Debtor to Defendant be avoided, that Plaintiff have a judgment against Defendant for \$734,797.71, plus Plaintiff's costs, interest from the date of the transfer, and that he have such other and further relief as your Honorable Court finds just and proper.

COUNT II

10. Paragraphs 1 through 5 are incorporated by reference herein as if fully set forth.

11. On or about June 27, 1984, which date is on or within ninety (90) days preceding the filing of the Bankruptcy Petition as described in paragraph 2 hereof, the Debtor paid \$200,000.00 by check number OV6112 to the Defendant on account of an antecedent debt.

12. Said transfer was made while the Debtor was insolvent.

13. Said transfer will enable defendant to recover more than it would receive as a creditor if (a) the bankruptcy case were a case under Chapter 7 of Title 11, United States Code; (b) the transfer had not been made; and (c) Defendant received payment of such debt to the extent provided by the Bankruptcy Code.

WHEREFORE, Plaintiff prays that the transfer by the Debtor to Defendant be avoided, that Plaintiff have a judgment against defendant for \$200,000.00, plus Plaintiff's costs, interest from the date of the transfer, and that he have such other and further relief as your Honorable Court finds just and proper.

COUNT III

14. Paragraphs 1 through 5 are incorporated by reference herein as if fully set forth.

15. On or about July 6, 1984, which date is on or within ninety (90) days preceding the filing of the Bankruptcy Petition as described in paragraph 2 hereof, the Debtor paid \$11,636.35 by check number OV6164 to the Defendant on account of an antecedent debt.

16. Said transfer was made while the Debtor was insolvent.

17. Said transfer will enable Defendant to recover more than it would receive as a creditor if (a) the bankruptcy case were a case under Chapter 7 of Title 11, United States Code; (b) the transfer had not been made; and (c) Defendant received payment of such debt to the extent provided by the Bankruptcy Code.

WHEREFORE, Plaintiff prays that the transfer by the Debtor to Defendant be avoided, that Plaintiff have a judgment against Defendant for \$11,636.35, plus Plaintiff's costs, interest from the date of the transfer, and that he have such other and further relief as your Honorable Court finds just and proper.

Respectfully submitted,
CIARDI, FISHBONE &
DiDONATO

By: _____
Paul J. Winterhalter, Esquire
Marc N. Bell, Esquire
Attorneys for Trustee

**UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

In re		: Chapter 11
AMERICAN INTERNATIONAL	:	
AIRWAYS, INC.	:	
	Debtor	: Bankruptcy
HARRY P. BEGIER, JR.,	:	No. 84-02379K
TRUSTEE	:	
	Plaintiff	:
	:	
v.	:	
	:	
UNITED STATES OF AMERICA,	:	
INTERNAL REVENUE SERVICE	:	Adversary No. 86-1076K
	Defendant	:

ORDER

AND NOW, this 21st day of October, 1987, upon consideration of the United States' MOTION TO CLARIFY OR GRANT RELIEF FROM STIPULATION OF FACTS, it is hereby ORDERED as follows:

1. The Motion is GRANTED in part and paragraph seven of the Stipulation shall be amended by addition of the following language "beginning no later than April, 1984. This Stipulation shall not preclude the Plaintiff from establishing that the date was earlier than April, 1984."

2. In light of the Plaintiff's reasonable reliance on the Defendant's earlier Stipulation that the Debtor was a monthly filer at all times pertinent to the time-period in issue, i.e., since January, 1984, in the preparation of the Trustee's Memorandum of Law, the Defendant shall pay the sum of \$375.00 as reasonable counsel fees to the Trustee as a condition for the allowance of this Motion.

Copies to:

Mark N. Bell, Esq.
1900 Spruce St.
Phila., PA 19103

Stuart J. Glick, Esq.
Trial Attorney, Tax Div.
U.S. Dept. of Justice
P.O. Box 227
Ben Franklin Station
Washington, D.C. 20044

DAVID A. SCHOLL
UNITED STATES
BANKRUPTCY JUDGE
3722 United States
Court House
Philadelphia, PA 19106-1763

Suzanne J. Young, Esq.,
Law Clerk
Joseph Simmons, Deputy in
Charge of Bankruptcy
Operations
ENTERED OCT 21, 1987

IN RE:) Bankruptcy Action 84-02379
) 86-1076 (11)
AMERICAN) Philadelphia, Pennsylvania
INTERNATIONAL) November 17, 1987
AIRWAYS) A.M. Session

**TRANSCRIPT OF HEARING
BEFORE THE HONORABLE DAVID A. SCHOLL
UNITED STATES BANKRUPTCY JUDGE**

For the Plaintiff:

PAUL J. WINTERHALTER,
ESQUIRE
Ciardi, Fishbone & DiDonato
1900 Spruce Street
Philadelphia, PA 19103

STUART J. GLICK, ESQUIRE
U.S. Department of Justice
P.O. Box 227
Washington, DC 20044

Bernadette Bush

DIANA DOMAN TRANSCRIBING
337 Maple Avenue
Audubon, NJ 08106
(609) 547-2506

THE COURT: Let me just ask one question of Mr. Glick before we get rolling. Mr. Glick, are you really disputing the later — you don't even address it in your memo — the two

MR. GLICK: Your Honor, it is our position that the Trustee would have to prove that the property was, in fact, property of the estate. Payment of money held in trust for the United States is not property, so . . .

THE COURT: Well, we know that trust money isn't property of the estate. I already ruled that.

MR. GLICK: Well, we are saying that these monies consisted of trust funds as well. They were payments of trust fund taxes and it is our position, under the legislative history, that those payments are deemed to be trust funds and not part of the estate and the Trustee has the burden of showing that, in fact, these were not monies which were withheld from trust funds but which were . . .

THE COURT: Of course, you know, my ruling is that you have the burden of showing that — tracing the funds. If you can't do that, then I think you lose on that theory. I ruled it in the AIA — in this very case. Plus I reaffirmed that in another decision, the *Miller* case.

MR. GLICK: Yes, Your Honor.

THE COURT: Plus the DC Circuit, as Mr. Winterhalter points out, is the first circuit to go on record and agrees essentially with my position.

MR. GLICK: Yes, Your Honor. This is simply the position put forward by the Government.

THE COURT: All right. That — you know, that is not going to be too persuasive, but — so it seems to me that you lose on those two later — unless there is some other theory you have — on the two later transfers, but the big transfer is definitely some questions about the seven hundred whatever it is. Okay. Well, all right. Let's get the testimony.

MR. WINTERHALTER: Your honor, I believe the best starting point for this proceeding would be simply to bring to the Court's attention the stipulation which has been filed. Now . . .

THE COURT: As amended, right

MR. WINTERHALTER: That is correct, Your Honor.

* * *

Q. (by Mr. Winterhalter) Mr. Miller, showing you a document that has been marked as plaintiff's exhibit one, would you please examine that document?

A. I have.

Q. Have you examined it?

A. Yes.

Q. Can you identify this document, Mr. Miller?

A. Yes. This is check 5379 from the operating account of American International Airways, dated April 30th, 1984, payable to the Internal Revenue Service in the amount of \$734,797.71.

Q. Briefly, Mr. Miller, what is the date of this check?

A. The date of the check is April 30th, 1984 and it cleared the Federal Reserve Bank on May 1st, 1984.

MR. WINTERHALTER: For the purposes of the record, Your Honor, this is the same payment that is referenced in the stipulation executed between the parties.

THE COURT: All right.

MR. WINTERHALTER: At this time, I would like to mark a document as plaintiff's exhibit two for purposes of the record. This is a copy of a treasurer's check.

Q. Mr. Miller, showing you a document that has been marked as plaintiff's exhibit two, will you please identify the document?

A. This is a photocopy of a treasurer's check from Industrial Valley Bank and Trust in the amount of \$695,000 payable to the Internal Revenue Service on April 30th, 1984.

Q. What is the amount of this check, sir?

A. \$695,000.

Q. Mr. Miller, briefly, in your head, can you calculate the total of payment number one — or plaintiff's exhibit number one and plaintiff's exhibit number two?

A. It is roughly one million, four hundred and thirty thousand dollars.

Q. Would it be correct to presume that the total payment is one million, four hundred and twenty-nine thousand, seven hundred ninety-seven dollars and seventy-one cents?

A. That, correct.

MR. WINTERHALTER: For the purposes of the record, Your Honor, that is, in fact, the exact amount that appears in the stipulation which the parties have filed.

THE COURT: All right. Well, I am sure we will be able to add those two together.

MR. WINTERHALTER: At this time, I would like to mark this original check plaintiff's exhibit three.

Q. Mr. Miller, showing you a check that has been marked as plaintiff's exhibit three, will you briefly examine that check.

A. I have examined it.

Q. Can you identify that check?

A. This is a check drawn on the American International Airways general operating account for \$200,000 payable to the Internal Revenue Service. It is check number 6112, dated June 22, 1984 and it cleared the Federal Reserve Bank on June 26, 1984.

MR. WINTERHALTER: At this time, I would like to mark this exhibit as plaintiff's exhibit four for the purposes of identification.

Q. Mr. Miller, will you please examine this check.

A. I have examined it.

Q. Could you identify this check, sir?

A. This check is check number 6164, drawn on the operating account of American International Airways, made payable to Internal Revenue Service for the amount of \$11,636.35. The check was drawn on June 24th, 1984 and cleared the bank on July 5th, 1984.

Q. Three out of the four of these checks came from the debtor's operating account; is that correct?

A. That's correct.

Q. Mr. Miller, at this time I would request — . . .

MR. WINTERHALTER: First I would request that this document, which has been previously marked as plaintiff's exhibit five, be so marked, for the purposes of this proceeding, as plaintiff's exhibit five.

Q. Mr. Miller, showing you a document that has been marked as plaintiff's exhibit five, will you please examine this document?

A. I have examined it.

Q. Mr. Miller, can you identify this document?

A. Yes, I can.

Q. Will you identify this document?

A. Yes, I will. This is a notice to American International Airways. It is a monthly filer. And, the notice was sent to AIA in February — it looks like 22nd, 1984.

* * *

Q. Mr. Miller, showing you a document that has been marked as P-13, can you possibly identify this document?

A. This is a photocopy of Section 31.6011, Subparagraph A-5, which is the requirements of the monthly returns.

THE COURT: Well, it is part of that section. It is only Subsection A.

MR. WINTERHALTER: That's correct. It is only Subsection A of that . . .

THE COURT: I guess it is still — it is in CFR, too, I presume.

MR. WINTERHALTER: Yes, it is 26 . . .

A. Yes, 26 CFR, Chapter One. The April 1st, '87 addition.

THE COURT: Okay. All right.

MR. WINTERHALTER: That's correct.

Q. Now, Mr. Miller, previously — just previously you testified as to the change of the — as to the change of the filing requirements upon receipt of the February 22nd notice in your brief colloquy with the Judge. I would like to direct your attention to the second column of that copy page, approximately halfway down, which is in the full body of the regulation . . .

MR. GLICK: Your Honor, the Government is going to have to object. He is not testifying as to fact now, he is just testifying as to law.

THE COURT: Yeah, where are you headed here? I mean, I can read it too.

MR. WINTERHALTER: Well, Your Honor, I was attempting to bring out exactly what the regulation requires.

THE COURT: All right. It sounds to me as if that is legal argument, really. All right. Sustained.

MR. WINTERHALTER: That's fine, Your Honor. I'll proceed with another course then. I ask you to set that aside.

Q. We have just recently marked P-6 then, can you identify this document?

A. This is a form 941 for January 1984, which is the Employer's Monthly Federal Tax Return for American International Airways, Inc. It was filed on March 15th, 1984.

Q. Mr. Miller, can you determine from this document what is — is this a document that is filed in the debtor's normal course of business?

A. When you are saying normal course of business, I would say no, because a normal course of business would be a quarterly filer and, you know, this is a document that had to be filed with regard to the February 1984 letter.

Q. Mr. Miller, from that document, can you determine how much tax was due for that particular period? What was the aggregate liability for that period?

A. AIA's liability to the Internal Revenue Service in January 1984 was \$242,016.06 according to this tax return.

Q. Mr. Miller, is this document signed?

A. Yes, it is. It is signed by Bruce Edmundson, who is the President of AIA.

Q. And, is there a date opposite that signature?

A. March 15th, 1984. And, there is also a date, March 15th, 1984, as received by the Internal Revenue Service of Jenkintown, Pen — in the Jenkintown, Pennsylvania office.

MR. GLICK: Your Honor, the Government is going to have to object. This witness is testifying with respect to this document. He has laid no foundation that he knows that this document is, in fact, what it purports to be. It seems that you would have to have someone competent who can, in fact, know that it was the tax returns for January 1984 which was filed by American International Airways. Anybody can read what is on the face of the document, but to know that this was, in fact, a true document, I don't believe this witness is qualified to testify.

THE COURT: Well, where did he see this? Where did you see it, Mr. Miller? Did you see it — how did you first . . .

A. I mean, I saw it in Mr. Winterhalter's office when we were preparing for the case.

MR. WINTERHALTER: Your Honor, if I may, this is also Government document number 12.

THE COURT: Oh, are you offering this too?

MR. GLICK: We will offer it to our witness, and we believe our witness to be the one who is qualified to testify with respect to it.

THE COURT: All right.

MR. GLICK: The question is whether or not this witness is, in fact, competent to testify with respect to this. He can state what it appears to be, but as a fact of what it is, it is the same testimony as if anyone . . .

THE COURT: All right. Well, okay. Maybe that's a fine line. All right. It seems to me that there is no dispute that it is genuine but all right.

MR. WINTERHALTER: I would believe that too. And, it really goes to the weight of the evidence, Your Honor, it doesn't go to . . .

THE COURT: It is not clear to me that you have established that this is something Mr. Miller found in the business records. He says he found it in your office.

MR. WINTERHALTER: That is correct, Your Honor.

THE COURT: But if you want to ask him — if there is something on here in particular you want to point him to, I'd certainly allow you to do that.

MR. WINTERHALTER: Your Honor, just for the record, I would like to review that the parties have stipulated, in fact, to when the payments were made and how those payments were applied.

THE COURT: All right. Well, if you did, then that is in the record anyway.

MR. WINTERHALTER: That's correct.

THE COURT: You don't have to put things in the record that are already in.

MR. WINTERHALTER: At this time, Your Honor, I would like plaintiff's exhibit seven to be marked.

THE COURT: In phrasing your questions, you'll phrase them consistent with what Mr. Glick had suggested. All right. Go ahead.

(Pause).

Q. Mr. Miller, showing you a document that has been marked as plaintiff's exhibit seven, can you identify this document?

A. Yes, 941M, Employer Monthly Federal Tax Return for February 1984 for American International Airways, Inc.

Q. Mr. Miller, with your accounting experience, can you determine from the face of this document what is the purported aggregate tax liability for this period?

A. The liability for February 1984 would be \$212,962.21.

MR. WINTERHALTER: For purposes of the record, Your Honor, this document is also Government exhibit number 11.

THE COURT: All right.

A. Could I just correct that. It is \$902.21, \$212,902.21.

MR. WINTERHALTER: Thank you.

Q. Mr. Miller, I want to refer you back now to plaintiff's exhibit five. Plaintiff's exhibit five is the February 22nd notice. You previously testified that the notice required monthly filing.

A. Yes.

Q. Based on plaintiff's exhibit six and plaintiff's exhibit seven, does it appear that these documents were filed in response to that notice?

MR. GLICK: Objection. It is just conjecture.

THE COURT: I think it would be, wouldn't it, Mr. Winterhalter? I'd sustain it.

MR. WINTERHALTER: All right, Your Honor.

Q. Based on — you've testified as to plaintiff's exhibit five. You've also testified that these two returns appear to have been filed and these were — these reflect the tax liability purportedly of the debtor corporation for January and February. Just one final question on plaintiff's exhibit seven. When does it appear that plaintiff's exhibit seven, which is the February 1984 return, was filed?

A. March 15, 1984.

THE COURT: That's because of the received stamp on that?

A. Well, it is signed down here. That is when you are supposed to sign it, the date you send it, and it says received, Internal Revenue Service, Jenkintown, Pennsylvania, March 15th, 1984.

THE COURT: How would they get it the same day it is signed? Do you have any . . .

A. It probably was hand-delivered. When you file these returns in accordance with this letter, it has to be sent to the district director, just not sent to the Internal Revenue Service, Philadelphia, Pennsylvania 19255. It's got to be sent to the identified person in the letter.

MR. WINTERHALTER: At this time, Mr. Miller, I would request that this document be marked as plaintiff's exhibit eight.

Q. Showing you a document that has been marked as plaintiff's exhibit eight, would you please examine that document.

A. I've examined it.

Q. Can you identify that document?

A. Well, this is a form 941, which was made to be a 941M and is filed as a monthly — Employer's Monthly Federal Tax Return for American International Airways for the month of March 1984. It was filed on April 14th, 1984 and signed by a Mr. Bruce Edmundson.

MR. GLICK: Objection, Your Honor. It appears to be signed by Mr. Bruce Edmundson. The Government would object whether or not the plaintiff has knowledge, just for the record.

THE COURT: All right. Is that what it appears to be?

A. That looks like the same signature that he signs in the Board of Directors minutes and other areas where he has been an authorized signer. I have seen his signature hundreds of times.

THE COURT: All right. But you are just testifying to what it appears to you looking at it?

A. Yes.

THE COURT: All right.

MR. GLICK: Your Honor, for the record, the Government would state that plaintiff's exhibit six . . .

THE COURT: Eight this is.

MR. GLICK: Well, six through 12 are what they purport to be, if that would clear things up.

THE COURT: Oh, all right. Okay. Thank you. Okay. Go ahead, Mr. Winterhalter.

Q. Mr. Miller, a quarterly filer for 941 taxes, when — his taxes are due when?

A. Well, tax liability arises the date that the payroll tax is purportedly withheld from the payroll, so I am kind of, you know, if you are saying, when is the taxes due, we, you are required to make a deposit based on the amount of taxes withheld within a specific period of time or when the liability arises. The liability to the Internal Revenue Service would arise at the time the payroll taxes are purported withheld from your paychecks.

Q. Mr. Miller, are you familiar with the requirements that taxes be withheld? Are you familiar with those requirements?

A. Yes, I am.

Q. And, based on your familiarity, what is your understanding?

A. Okay. When you with — if you have a payroll, and this is with regard to payroll taxes, if you have a payroll and let's say it is on November 17th, and that payroll exceeds where there is going to be more — in excessive of \$3,000 in payroll taxes withheld, you are required within three days of November 17th to make a deposit in an approved federal list — you know, federal reserve institution, most likely a commercial bank, of the monies that were withheld purportedly as of November 17th. So, specifically, let's say you had \$5,000 in payroll taxes withheld or should have been withheld on November 17th, that deposit had to be made at, let's say, First Pennsylvania Bank by November 20th with, you know, a federal deposit coupon advice or something like that. And, that's when the payment of those taxes should have been on deposit at the federal, you know, federal approved institution.

Q. Mr. Miller, when does the liability arise?

A. When the tax is withheld from the paychecks.

Q. What happens if the employer doesn't pay the tax within that time frame?

MR. GLICK: Again, objection. He's — it is legal argument that he is raising. If he wants to state his opinion of what he believes it to be, that's one thing. But just to state what is the law, I believe that is a matter for the Court not the witness.

THE COURT: Well, to a certain degree, I think that is correct. I'll sustain that.

MR. WINTERHALTER: Thank you, Your Honor.

Q. Mr. Miller, is it your opinion that most taxpayers pay the employment taxes in this fashion?

A. Well, most tax — you have to comply to certain rules, so most taxpayers, you know, comply with the rules. If you are withholding . . .

MR. GLICK: Objection as irrelevant, Your Honor.

THE COURT: Yeah. Just what do they do, Mr. Miller?

A. Well, this \$3,000 is a three-day banking rule which would be — that AIA would qualify under. But like certain companies wouldn't qualify under the three-day banking rule because their payroll would be less and there is other rules to be followed.

THE COURT: Well, let's assume they are over \$5,000 — \$3,000.

A. So if it is over — if it is a three-day banking rule, yes, they would be required to make the payment of taxes withheld from the employees paychecks within three banking days of the payroll period. So that would mean — you know, most pay periods for a lot of companies end on a Friday, that deposit would have to be made by the following Wednesday because that is their banking day. Saturday and Sunday wouldn't be included in there.

MR. WINTERHALTER: I would request that this document be marked as P-9.

Q. Mr. Miller, showing you a document that has been marked as P-9, please examine this document.

A. I've examined it.

Q. Can you identify it?

A. This is the . . .

THE COURT: What does it appear to be?

A. This appears — this appears to be a form 941M, Employer's Monthly Federal Tax Return for May 1984, for American International Airways, which was filed on May 15th, 1984, received on May 15th, 1984 by the director of the Internal Revenue, Jenkintown, Pennsylvania. Excuse me, Your Honor. Could I just check — I've got some records in my brief case I would like to just check and I might be able to identify these records better if I can compare them.

THE COURT: All right. Sure.

MR. WINTERHALTER: Your Honor, I would request a five minute recess.

THE COURT: All right.

MR. MILLER: I don't need that long. I just need to pull out.

THE COURT: Well, we will take a minute until Mr. Miller checks his records..

(Pause).

THE COURT: All right. You can't really discuss that with Mr. Winterhalter.

MR. MILLER: No. See, Your Honor, what I wanted to. . .

MR. GLICK: Your Honor, there is no question pending.

THE COURT: Yeah. All right. Go ahead, Mr. Winterhalter.

Q. Mr. Miller, you presently before you have, I believe, plaintiff's exhibit nine, if I am not mistaken.

A. Yes.

Q. And, can you identify what it purportedly is — or purports to be? And, simply for the continuity of the record, does this document also contain the same signature that appears on the other documents?

A. Yes. I would also like to clarify something with regard to at least P-7, P-8 and P-9, with regard to the question if it is a company record.

MR. GLICK: Objection, Your Honor. There is no question

. . .

THE COURT: Yeah, there's no questions. I will have to stop you there, Mr. Miller. All right, Mr. Winterhalter.

Q. Mr. Miller, is this a company record?

A. Yes, The reason I know that this one, P-9, is a company record, is because this one is stamped received and the return it was given — I had copies of all these returns. I had some that were from company records and some that were given to us by the Internal Revenue Service. The Internal Revenue Service records are exact reproductions of these documents, except that they have the word timely written on the top of the filed return. So this return, which would be hand-delivered, the company would take, you know, having its own copy stamped when it would hand-deliver the record. And, then when the Internal Revenue Service would keep its record, there were certain notes made on the return which do not appear on P-7 through P-9. And, those notes do appear on the Internal Revenue Service's return.

Q. Mr. Miller, P-9, I direct your attention to the notations made in response to inquiry number 13, or question number 13, I am not exactly sure how it should be properly phrased, but number 13 on the return itself. And, I am asking . . .

THE COURT: You mean line 13?

MR. WINTERHALTER: Yes.

Q. Number 13. I am asking you to explain this for me, please. On number 13, aside from that, there is three columns. Tax liability — and I am reading directly from the document — tax liability for period, date of deposit and amount desired. Now, what — can you explain these three columns for me on any — I am sure it appears on every return.

A. Okay. The first column is the tax liability for the period. If you have a payroll — and what this tax return has done . . .

THE COURT: Excuse me, where are you reading from right now?

A. Right here, Your Honor.

THE COURT: Oh, all right. I see it. Okay.

A. This tax liability for the period means you had a payroll that ended in this situation in period B, from the eighth of the month through the 15th day of the month. And, that the

amounts withheld in FICA taxes, F-I-C-A taxes, totalled \$136,513.36. So your liability for that pay period to the Internal Revenue Service would be the \$136,513.36. Because that amount is greater than \$3,000, that should have been deposited within three banking days of the specific day that that deposit was made. I mean that, you know, liability was withheld and that deposit made, I'm sorry.

Q. Mr. Miller, does P-9 purport to show any monies deposited?

A. It has an aggregate deposit of \$300,000 called the final deposit for the month. And, it has an overpayment of \$48,624.48.

MR. WINTERHALTER: At this time I would like this document marked as plaintiff's exhibit ten. It is a two-page document.

Q. Showing you a document that has been marked as plaintiff's exhibit ten, will you please just briefly take a look at this.

A. I've read it.

Q. Mr. Miller, can you identify this document?

A. This is a letter to Milton Rosenthal of the Internal Revenue Service from Leonard Sarnier, he was an attorney for AIA, referencing an agreement for the payment of 941 taxes.

MR. GLICK: Objection, Your Honor. We are not certain where the question is leading, but we would say that this document in and of itself would be hearsay. And, additionally, there has been no foundation that he has personal knowledge as to this document.

THE COURT: That's true. Sustained.

Q. Mr. Miller, what is — have you ever seen this letter before?

A. Yes, I have.

Q. Can you explain when, to the best of your recollection, you first saw this letter?

A. In your office in May of 1987.

Q. What was the purpose of your viewing that letter at that time?

A. It was evidence of an agreement for the payment of 941, which are the employees taxes and also the excise taxes which were due for this — in response to this February notice of what we received. As a matter of fact, the February notice is referenced in paragraph four of this letter, which is exhibit P-5, the February notice I am referring to.

MR. WINTERHALTER: For the purposes of the record, Your Honor, this would be Government exhibit number one.

THE COURT: Oh, I see. This is your exhibit too, Mr. Glick, this P-10?

MR. GLICK: It may be, Your Honor. We have it listed. We haven't made a determination as to whether or not we are going to be using it.

THE COURT: Well, all right. It would seem if you have it, it is probably legitimate then. All right. Go ahead.

MR. WINTERHALTER: At this time I would like to mark two documents at this time. Plaintiff's exhibit 11 and plaintiff's exhibit 12.

Q. Mr. Miller, showing you two documents that have been marked plaintiff's exhibit 11 and plaintiff's exhibit 12, I would like you to examine both of those documents.

A. I have.

Q. Directing your attention to plaintiff's exhibit 12 — excuse me, plaintiff's exhibit 11, will you please — can you identify this document?

A. Yes, I can.

Q. Will you identify this document for the Court?

A. Yes, I will. It is a photocopy of bank statements for American International Airways' special fund bank account that was opened in response to a notice received regarding Section 7512 of the Internal Revenue Code to establish a special bank account for the deposit of taxes. This changes the depository requirements of a taxpayer.

Q. Mr. Miller, in your practice, do you have occasion to view various bank statements of different clients?

A. Yes, As a matter of fact with regard to AIA I reviewed all the bank statements during this period and there is on P-12, a \$695,000 internal charge on April 30th. And, that was the only

internal charge for \$695,000 that I was able to ascertain. That would be the source of this treasurer's check from Industrial Valley Bank payable to the Internal Revenue Service.

Q. For the purposes of clarification of the record, will you please identify the account number for these — for the statement.

A. This is account number 0-802-304-2.

Q. Mr. Miller, I note, looking at the statement, the last statement date has 000000. Why would that be?

A. Okay. That is on P-11. That is because this account was not open until the deposit on March 22nd, 1984 for \$108,765.31 was made. The last statement date means there was no preceding bank statement issued for that.

Q. So, therefore, this document indicates that this is a statement of the transactions in that account as of the statement date?

A. That's correct. There is an opening balance up there, zero, and an ending balance or closing balance, is what they call it, of \$235,051.42.

Q. All right. And, that closing balance would also appear as the ending balance on P-12 — or excuse me, the opening balance on P-12?

A. That's correct.

Q. And, on P-12, which is — P-12 is the statement date for

... A. P-12 is the statement date for April 30th, 1984.

Q. On the same account?

A. Yes, it is.

Q. So this is just the following month's statement?

A. That's correct.

Q. And, out of this statement — well, based on the document before you, can you identify any charges out of this statement?

A. Yes. There is a \$695,000 charge made on April 30th, 1984.

Q. Mr. Miller, the title of the account, can you briefly just explain what that language appears to be?

A. Okay. That is a specified language according to Section 7512 of the Internal Revenue Code. When a taxpayer for an — you know, is involved in an extraordinary situation for the failure to pay taxes, that the Internal Revenue Service may require it to file its taxes in accordance with Section 75 — file its deposits in accordance with 7512, whereupon a special Trustee bank account is created and the actual name of the account, as included on this Industrial Valley Bank statement, is the same as what is required under Section 7512.

Q. Mr. Miller, if the debtor was a monthly filer, . . .

A. Right.

Q. If he was a monthly filer, when would his return be due?

A. His return would be due the 15th of the following month. For example, if he was a Jan — monthly filer and he filed a January return it would be due on February 15th.

Q. And, that would be for 941 taxes?

A. Yes.

Q. Would the same be true for 720 taxes?

A. Yes.

* * *

THE COURT: Let me ask this. Did — what is the penalty? How do they measure it, do you know?

By Mr. Miller:

A. Well, Your Honor, that's why you have to fill out when the liability occurs because they compute it on a percentage from the day that you didn't make your deposit, based on when the liability to the Internal Revenue Service occurs.

THE COURT: I see. All right, Thank you.

By Mr. Glick:

Q. Sir, directing your attention to plaintiff's exhibit number eight, would the period which is down — looking under the column on the left-hand side under number two total, I'll — specifically lines T and U of that exhibit, . . .

A. T and U, okay.

Q. . . . would the figures to the right of T and U, summed together, would that be the amount of money which was — which should have been deposited after the payment for the week of 12 through 19?

A. Well, that's — no, not necessarily because in this situation line T could have been received on the 12th. If the payment — payroll was on the 12th and this should have been paid by the 15th. And, in U it was on the 16th and the payment would have been due by the 19th. So they would have been two different periods of times . . .

Q. So then there should have been — I'm sorry.

A. . . . where deposits had to be made. There should have been two separate deposits, one for \$53,000 and one for \$79,000.

* * *

MR GLICK: No further questions.

THE COURT: All right. You may step down. Thank you, Mr. Miller. Do you have any other witnesses, Mr. Winterhalter?

MR. WINTERHALTER: Your Honor, I do not have any other witnesses. However, I would like to move for the introduction of certain evidence.

THE COURT: All right.

MR. WINTERHALTER: If I may, I would like to introduce at this time — or move for the introduction of plaintiff's exhibit one, plaintiff's exhibit two, plaintiff's exhibit three, plaintiff's exhibit four, to which I do not believe you would have any objection.

MR. GLICK: No objection.

THE COURT: All right.

MR. WALTERHALTER: At the same time, Your Honor, I anticipate no objection on plaintiff's exhibit 11 and plaintiff's 12, bank statements.

MR. GLICK: No objection.

THE COURT: All right. Those would be admitted.

MR. WINTERHALTER: Your Honor, now I would like to address and move for the admission of plaintiff's exhibit six, seven, eight and nine, Your Honor.

MR. GLICK: I have no objection to those either, Your Honor.

THE COURT: All right. They will be admitted.

MR. WINTERHALTER: Now, Your Honor, I would like to move for the introduction of plaintiff's exhibit five.

MR. GLICK: The Government would object to that, Your Honor. I don't believe — according to Rule 602, the witness is only competent to testify with respect to documents of which he has personal knowledge. In this case, with respect to document P-5 and — that was the only one you just stated, P-5?

MR. WINTERHALTER: Yes.

MR. GLICK: With respect to P-5, he has stated he has no personal knowledge, he only looked at it in his attorney's office. So whether or not this is what it purports to be, I don't believe this witness is qualified to state.

THE COURT: Mr. Winterhalter?

MR. WINTERHALTER: Your Honor, I believe that this document is a document — is a business record of the debtor corporation. It appears self-evident that the document was addressed to Mr. Bruce Edmundson. Mr. Bruce Edmundson, without question, the witness has testified, was the chief executive officer and president of the debtor corporation during the time immediately preceding the bankruptcy filing. Certainly, Your Honor, the terms of the document speak for itself. It is a document which the Internal Revenue Service intends to introduce, intends to use in this proceeding, Your Honor. The document is frequently referenced throughout the entire statement of both the Internal Revenue Service's brief and of course from this brief, Your Honor. The filing requirements of the debtor corporation are referenced in this letter. For the testimony that is presented based on this document, I believe that there is proper foundation for the introduction of the copy of this letter, Your Honor. It is a business record of the debtor corporation and I believe it should be (indiscernible).

MR. GLICK: Your Honor, the position of the Government is whether or not the Government introduces it or whether or not it could put on a proper foundation is irrelevant to determine whether or not Mr. Miller is competent to testify with respect to this. And, Mr. Miller, is, in fact, competent to put this document into evidence through his testimony. That is the objection raised by the Government.

THE COURT: Well, I am going to allow it, because I think that to me we have the sufficient reliability established. And, I

think that is really the purpose of the business records rule. I believe that it can be admitted under that rule so I will admit it.

MR. WINTERHALTER: Thank you, Your Honor.

THE COURT: All right.

* * *

By Mr. Winterhalter:

Q. The letter that you — that was identified as plaintiff's exhibit five changed the filing requirements and this notice changed the deposit requirements?

By Mr. Zlatkin:

A. I would say — if I could state it in my own terms?

Q. Please do.

A. Okay. I would say that the letter gave official notice from the service to the taxpayer that they were no longer going to be a quarterly depositor. I would say that this form 2481 gave the specifics, in terms of instructions, to the taxpayer in this case as to how to accomplish filing, paying and depositing of taxes under this 7512 provision.

Q. How were they — what type of filer and depositor were they before this notice?

A. Not meaning to be funny, but they were poor filers and poor depositors. They didn't make deposits. That was the basis for submitting this recommendation and ultimately carrying it out.

Q. You were pursuing to protect the Internal Revenue Service's interest in collection of this account; is that correct?

A. That's correct.

Q. And, you served this in March of 1984; is that correct?

A. That's correct.

* * *

By Mr. Winterhalter:

Q. Okay. All right. I would like to direct your attention to Government exhibit number four. Just for the purposes of continuity, could you identify again this exhibit?

By Mr. Zlatkin:

A. Yes. This is a 720 monthly federal excise tax return with the annotation, timely, for American International Airways, Inc., for the month of February 1984.

Q. The annotation, timely.

A. Yes.

Q. When was this return filed?

A. Judging by the date stamped, if I could read it correctly, it looks like it was March 15th, 19 — well, I can't read the rest of the year.

Q. The document was timely filed on March 15th? That is what it says, doesn't it?

A. That's what that says, yes.

Q. Now, we — on your direct examination you were referencing the requirements for depositing taxes and when penalties can be imposed for depositing taxes. I want to direct your attention to that line of questioning that Mr. Glick attempted to bring — or to enlighten this Court. Now, you're very familiar with the Internal Revenue Code; isn't that correct?

A. I am conversing with it. (sic: conversant)

Q. Yes, sir. A normal taxpayer is required to make tax deposits; isn't that correct?

A. That's correct.

Q. If he meets the requirements of so many dollars for so many periods, et cetera?

A. That's correct.

Q. And, to your knowledge, the debtor corporation, American International Airways, was required to make tax deposits; is that correct?

A. At which point — at what point?

Q. In — for the purposes of keeping the record clear — in the fourth quarter of 1983.

A. That's correct.

Q. And, they were required to make them in January of 1984?

A. That's correct.

Q. But they didn't make them?

A. That's correct.

Q. All right. Now, to the penalties. You stated, and correct me if I am wrong, because I am not exactly certain that I followed it clearly, that if a party does not dep — any party, any

employer, does not timely deposit the tax obligation, they are — you tell me, please, are they or are they not assessed a penalty?

A. Yes, they are assessed a penalty.

Q. When are they assessed that penalty?

A. Only after the return is filed, at the due date of the return and an assessment is made for . . .

Q. What if — oh, please, don't . . .

A. I was just going to say an assessment is made for tax.

Q. What if a return is never filed?

A. The service has the authority under 620B prepare a substitute return and then ultimately make an assessment.

Q. So at some time if a return is not filed, they are going to be assessed with failing to not pay the tax in the nature of a deposit?

A. We have sufficient resources, and we are aware of them, that should happen.

* * *

By Mr. Glick:

Q. If notice was given in — I believe you understand — do you understand plaintiff's argument with respect to when they assert notice was given?

By Mr. Zlatkin:

A. To an extent.

Q. And, what do you foresee their argument as being?

A. I basically believe that they — they're taking the position that since the letter is dated in February of 1984 that the first required filing would be in March — March 15 of 1984, and that, in fact, would have to consider the months of January and February.

Q. And, would then — if that was the case, would one return have been required to be filed?

A. That's correct.

Q. So they would not have — even if that was the position, they still shouldn't have filed January and February returns?

A. They would not have had to file them individually.

Q. What was the net effect of this — of — to your knowledge, of the 7512 notification with respect to the filing of taxes and when those taxes were due?

A. My opinion is that it had no — it presented no hardship to the taxpayer corporation and if I can explain, I mean simply that they would be required to make deposits on a weekly basis based on the amount of their payroll in any light and that the conversion from filing from a quarterly to a monthly basis really didn't cause them a hardship and, in fact, managed to present the Government with some guarantee that sizeable liabilities could not be run up, with the service having no power to do anything until the end of the quarter. It was a safeguard.

Q. What was the date the — I believe you testified that the — if notice was given in March, that the return should have covered January, February and March; is that correct?

A. Correct.

Q. I believe you also testified that that return should have been filed April 15th or thereabouts; is that correct?

A. April 15th, 1984 if it was a legal day of business.

Q. If they were a quarterly filer, when would the return be filed?

A. April 30th, 1984 for the first quarter of 1984, 941.

Q. Were you monitoring this account during this period?

A. I was.

Q. To your knowledge, did the taxpayers make deposits?

A. Not to my knowledge.

Q. Did you receive any — did you receive the — do you recall receiving plaintiff's exhibit number one?

A. I recall receiving the exhibit.

Q. Were there any instructions onto what taxes this amount should have been applied to?

A. I believe there were.

Q. And, this — for this specific check?

A. Not on the check itself.

Q. Okay. Were there any instructions with respect to this specific check? How this specific check were to be applied? Do you know?

A. No instructions, at least on the check.

Q. Were there any — well, turning to plaintiff's exhibit number two, were there any instructions with respect to how this specific check were to be applied?

A. As stipulated on the check?

Q. Correct.

A. No, there were no instructions.

THE COURT: Well, you keep qualifying that. You're saying as stipulated on the check. As opposed to what?

A. As opposed to an accompanying letter.

THE COURT: Well, there was an accompanying letter?

A. As opposed to a stipulation entered into with a representative of the service and a representative of the American International Airways.

THE COURT: Well, were there these things? Were there letters or stipulations?

A. Yes, sir. Yes, there were.

THE COURT: There were? Why don't we have them?

Q. To clarify the record, was there . . .

MR. WINTERHALTER: It was stipulated. The application of the payments was stipulated.

MR. GLICK: Well, the application of the payments is stipulated, however . . .

THE COURT: Well, you're saying it is stipulated. Where is it stipulated?

MR. WINTERHALTER: Your Honor, in the stipulation of facts that was filed.

THE COURT: All right. Where?

MR. WINTERHALTER: Your Honor, . . .

MR. GLICK: Well, just to clarify what I am trying to get at, Your Honor, with respect to these, are there any — the stipulation, Your Honor, states that both checks are to be applied together. I was wondering if there were any instructions how each individual check was to be applied separately.

A. No, there were no instructions of that nature.

Q. So the only instructions were how they were both to be applied; is that correct?

A. That is correct.

THE COURT: Oh, all right. Yes, that is in the stipulation. All right.

A. May I clarify a point?

THE COURT: Yeah, go ahead. Any clarification would be helpful at this point. Yes, go ahead.

A. Originally, I was asked what was owned by American International Airways and I answered \$15,000 was assessed. It is probably important to clarify the fact that a million five was owed with respect to accrued taxes that had not yet been assessed. The basis for these two payments was two-fold. Was to recover the delinquencies and the taxes that were accruing on a current basis as of the date of the submission, April 30th. So that the corporation had the opportunity to continue in business. That is the basis of this stipulation.

Q. Just to — I want to understand. You are saying that the check was to be applied to the current tax liabilities?

A. It was applied to — if my recollection is correct, to the

MR. GLICK: Well, Your Honor, I believe it has been stipulated to what the check has been applied at any rate.

A. It would be current through the April month. That was my understanding as to how the division of monies were to be applied in conjunction with what had already been run up.

Mr. Bruce Edmondson
As Chief Financial Officer
American International Airways Inc.
2655 Philmont Avenue
Huntingdon Valley, PA 19006

Alan D. Zlatkin

(215) 887-5751

C:ADZ:2337

Feb. 1984

Dear Mr. Edmondson:

Our records show that you have not paid over to the United States, at the time and in the manner prescribed by law and regulations, the taxes you were required to withhold from your employees.

Therefore, under the provisions of Section 7512 of the Internal Revenue Code, you are notified that effective for the month of March 1984 you must file Form 941 for the first quarter of 1984 by April 15, 1984 and for each subsequent month you must file Form 941-M by the 15th day of the month following the month covered by the return with the Revenue Officer named above.

In addition, our records show that you have not paid over to the United States, at the time and in the manner prescribed by law and regulations, the excise taxes for transportation of persons by air. Therefore, you must file Form 720 for the first quarter of 1984 by April 15, 1984 and for each subsequent month you must file Form 720 by the 15th day of the month following the month covered by the return with the Revenue Officer named above.

Form 2481 provides a detailed explanation of the responsibilities and procedures as they relate to depositing, filing, and payment for the Forms 941 and 720 monthly returns.

If you have any further questions, please contact the person whose name and telephone number are shown above.

Sincerely yours,

J. L. West
Chief, Collection Division

UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

In re:

AMERICAN INTERNATIONAL
AIRWAYS, INC.,

Debtor

: CHAPTER 11

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:

: BANKRUPTCY NO. 84-02379K

HARRY P. BEGIER, JR., TRUSTEE, :
Plaintiff :

2

UNITED STATES OF AMERICA,
INTERNAL REVENUE SERVICE,
Defendant

ADVERSARY NO. 86-1076

STIPULATION

The Trustee, Harry P. Begier, Jr., by and through his counsel, CIARDI, FISHBONE & DiDONATO, and the United States of America, Department of Treasury, Internal Revenue Service, by its counsel, THE UNITED STATES DEPARTMENT OF JUSTICE, TAX DIVISION, hereby stipulate and agree as follows:

WHEREAS, on September 18, 1986, the Trustee filed a Complaint against the Internal Revenue Service seeking to avoid certain preferential payments made by the Debtor Corporation to the Service during the ninety (90) days preceding the bankruptcy filing:

WHEREAS, a trial was held on this complaint before this court on November 17, 1987;

WHEREAS, subsequent to the close of the trial, the Trustee discovered a document which was not considered at trial;

WHEREAS, the Trustee has filed a Motion to Open the Record to permit the introduction of this correspondence; and

WHEREAS, the parties, through their counsel, desire to mutually resolve this issue short of further argument and litigation;

NOW THEREFORE, it is hereby stipulated and agreed by between the parties that the letter from Alan D. Zlatkin to Bruce Edmondson dated May 1, 1984, a copy of which is attached as Exhibit "A", shall be admitted into evidence without objection and incorporated in the record of the proceeding, and further that all parties shall bear its own costs of this Motion.

FOR THE TRUSTEE:

CIARDI, FISHBONE & DiDONATO

By: PAUL J. WINTERHALTER
1900 Spruce Street
Philadelphia, PA 19103
FOR THE UNITED STATES OF AMERICA
DEPARTMENT OF TREASURY,
INTERNAL REVENUE SERVICE:

By: STUART J. GLICK
Trial Attorney, Tax Division
U.S. DEPARTMENT OF JUSTICE
P.O. Box 227
Ben Franklin Station
Washington, DC 20044

APPROVED BY THE COURT THIS DAY OF
1988.

By: DAVID A. SCHOLI, U.S.B.J.

Internal Revenue Service

Department of Treasury

District

Director

American International Airways Inc.
2655 Philmont Ave.
Huntingdon Valley, PA 19006

Attn.: Bruce Edmondson

Person to Contact:

A. D. Zlackin

Telephone Number:

(215) 877-5751

Refer Reply to:

C:ADZ:2337

Date: May 1, 1984

Dear Mr. Edmondson:

Thank you for your recent payment of \$1,429,797.70. The payment was applied as follows:

1) 941-8401	259,992.98	— Full payment
2) 941-8402	228,781.00	— Full payment
3) 941-8403	105,765.68	— Part payment
4) 720-8402	305,460.34	— Full payment
5) 941-8404	300,000.00	— Current Tax
6) 720-8404	<u>299,797.71</u>	— Current Tax
	695,000.00	
Total — \$1,429,797.70	<u>734,797.71</u>	
	1,429,797.71	

Please note the credits applied for your April returns (941 and 720). They should be shown as deposits on each return. The division of the \$529,797.71 designated to current taxes was purely speculative since you did not indicate the actual amounts that are due for April. I will anticipate full payment of the 941 and 720 for April 1984 on May 15, 1984 when you file the tax returns with me.

It is now the beginning of a new month. I will again remind you to make current deposits (for 941 and 720) in the special bank account as per the Notice 2481 issued to you. On May 15, 1984, I want you to present to this office proof of deposits. You will have to show me a payroll summary detailing the payrolls

and resultant tax for May 1 to May 15, 1984. You must also produce deposit slips indicating amounts deposited. Lastly, I want to see a statement of what is in this special account as of May 15, 1984. There must be complete compliance with the Notice 2481 requirements, or it will be necessary to recommend enforcement.

American International Airways Inc.

There are two assessed periods to be paid in full on May 31, 1984. They are:

1) 941-8403	274,342.90 plus penalty and interest
2) 720-8403	<u>250,177.39</u> plus penalty and interest

TOTAL — \$524,520.29 plus penalty and interest

I will calculate the additional penalty and interest and send you a bill in advance of the 31st.

Please call me if you have any questions.

Respectfully,

A. D. Zlackin
Revenue Officer